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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNITED STATES OF AMERICA, PETITIONER

v.

R. B. RANDS, ET UX.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's memorandum opinion of October 12, 1964 (R. 38-39) is unreported. The district court's earlier opinion denying respondents' motion to amend their notice of appearance (R. 35-37) is reported at 224 F. Supp. 305. The opinion of the court

of appeals (App. A, *infra*, pp. 1a-16a) is reported at 367 F. 2d 186.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 17a) was entered on October 7, 1966. By orders of January 9 and February 2, 1967, the time for filing a petition for a writ of certiorari was extended to and including February 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when the United States condemns land bordering a navigable stream for a river improvement, the condemnee is entitled to receive (as just compensation for private property taken) a special increment based upon the value the land may have as a potential port site.

STATEMENT

Respondents owned two tracts of land riparian to the Columbia River,[1] which the government condemned in connection with the John Day Lock and Dam Project. The stated purposes of the project were flood control, river improvement and hydroelectric development.[2] Upon trial of the issue of just compen-

[1] Tract 2403, containing 121 acres, and Tract 2514, containing 139 acres (R. 5, 41).

[2] River and Harbor Act of 1950, 64 Stat. 163, 179; see H. Doc. No. 531, 81st Cong., 2d Sess., p. 282, *et seq.*

sation for Tract 2514, the jury found its fair value to be $7,000 (R. 66); the parties, by stipulation, then fixed compensation for Tract 2403 at $2,420 (R. 67).

At trial, respondents' witnesses based their opinions of value on use of the land for sand and gravel and agricultural purposes, and the opinions of the government's witnesses were based on agricultural value alone (R. 41). Respondents sought to show, in addition, that their land was valuable as a potential port site and submitted an offer of proof as to the amount of such value (R. 42). The trial court held, however, that the land's potential port-site value was not a proper element of just compensation. In a memorandum opinion filed October 12, 1964, the court reasoned as follows (R. 38-39):

> I am unable to distinguish between the value of land as a site for hydroelectric power purposes, the issue before the court in *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1955), and the value of land as a site for port operations. The successful operation of each depends on the flow of the stream. A port without water is no more susceptible to successful operation than would be a hydroelectric plant without its source of power. It is my belief that the value, if any, for port purposes is subject to the overriding navigational [servitude] of the United States, which permits the appropriation of any such a property right by the United States without compensation. * * *

On appeal, the court of appeals reversed, holding that riparian lands' potential port-site value should be included in just compensation, calculated "in the

light of a realistic estimate of the chance that the government will in fact exercise its servitude" (App. A, *infra*, p. 12a).[3]

REASONS FOR GRANTING THE WRIT

The decision below, holding that the government must pay a riparian landowner for the value of his condemned land as a potential port site—an increment of value arising from and dependent upon the navigational potential of the stream along which the land is located—is in conflict with this Court's recent decisions in *United States* v. *Twin City Power Co.*, 350 U.S. 222, and *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624. If allowed to stand, the Ninth Circuit's decision will have a direct impact on federal projects involving the great river basins of the West and, by engendering confusion as to the scope of the federal commerce power, is likely to affect the cost of federal river projects in other parts of the country.

1. Both *Twin City* and *Virginia Electric* held that the value of riparian uplands as a potential hydroelectric power site is not an element of just com-

[3] More than six weeks after being served with the complaint respondents sought to contest the government's right to take their land by means of a motion to amend their previously filed notice of appearance (R. 31-34). The trial court denied the motion on October 16, 1963, on the ground that it was untimely under Rule 71A(e), Fed. R. Civ. P. (R. 35-37). On appeal, the court of appeals held that, even assuming the time limit in Rule 71A(e) is not mandatory, the district court did not abuse its discretion in denying respondents' motion.

pensation payable upon condemnation by the federal government. The rationale of this ruling was clearly expressed in *Twin City*, 350 U.S. at 224-225, as follows:

> The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. * * * [That interest] is a dominant one which can be asserted to the exclusion of any competing or conflicting one. * * *
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> * * * *
>
> * * * [Thus no landowner may claim] a value *in the flow of the stream*, a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses. * * *

And in *Virginia Electric*, 365 U.S. at 627-629, the Court reiterated these principles:

> This navigational servitude * * * is the privilege to appropriate without compensation which attaches to the exercise of the "power of the government to control and regulate navigable waters in the interest of commerce." * * *
>
> * * * *
>
> * * * Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, * * * it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated.

As the district court properly held, these principles are applicable here. The port-site value sought by

respondents, like power-site value, inheres in the flow of the stream on which their land borders. Indeed, it is that very quality of the stream in which the paramount governmental interest is historically best established — *i.a.*, its navigability — which underlies whatever value the adjacent lands may have as port sites. Moreover, like the appropriation of that flow for private power purposes (16 U.S.C. 797(e)), the private utilization of a navigable stream for the operation of port facilities is contingent upon the issuance and continuing effectiveness of a federal license. Act of March 3, 1899, Section 10, 30 Stat. 1151, 33 U.S.C. 403. Thus, like water-power value, port-site value depends upon a privilege "that the Government in the exercise of its dominant servitude can grant or withhold as it chooses." *Twin City*, 350 U.S. at 228; cf. *United States* v. *Grand River Dam Authority*, 363 U.S. 229.

The mere physical adaptability of condemned land to certain uses does not determine the extent of compensable value. Just compensation involves only the condemnee's loss, not the condemnor's gain. *Olson* v. *United States*, 292 U.S. 246, 256, 261;[4] *Shoemaker* v. *United States*, 147 U.S. 282, 305. Note, *Power Site Value in Eminent Domain Proceedings: A New Toll Charge for Water Resource Development*, 65

[4] In *Olson*, this Court held that the potential value of land bordering a Minnesota lake for reservoir purposes was not compensable. This ruling was based on the fact that only the government, and not the condemnee, "as a legal and practical possibility * * * could have acquired the right to flow the lands necessary" for the creation of a reservoir. 292 U.S. at 260.

Yale L.J. 96 (1955). Where, as here, the use claimed for the land taken arises from the adjacent river's navigability—in which no private ownership rights may exist—and is entirely dependent, both for its inception and its continuation, upon governmental authorization, the taking does not result in a compensable loss to the landowner.[5] As this Court concluded in *Twin City*, 350 U.S. at 228, "What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys. * * * To require the United States to pay for this * * * value would be to create private claims in the public domain." That is precisely the effect of the decision below.

2. The court of appeals declined to follow the *Twin City* and *Virginia Electric* rationale because it found "other considerations" more persuasive (App. A, *infra*, p. 9a). As we briefly show, none of these considerations justifies the result reached below.

The court below placed primary reliance on that part of the decision in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, holding the value of condemned land for lock-and-canal purposes compensable. But whatever the validity of that ruling, which involved a diversion of the waterway from its natural bed and thus, arguably, an independent use of the land, it should not be applied where, as here, the

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[5] Even if the government's action may be said to have resulted in the frustration of respondents' business plans or expectations—and it is far from clear that this was the case—no right to compensation would arise from such frustration. *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 236.

allegedly compensable use is directly attendant to the natural flow of the stream. As this Court indicated in *Twin City*, the lock-and-canal holding of *Chandler-Dunbar* should properly be confined to "the special facts of the case" (350 U.S. at 226, fn.). To the extent that *Chandler-Dunbar* may be inconsistent with this Court's subsequent decisions, the more recent rulings are, of course, controlling.

The court of appeals also relied—improperly, we submit—on the fact that, after the project was developed, the government conveyed excess lands to the State of Oregon for port purposes,* presumably at their then current value. This transaction is wholly irrelevant to the issue involved here. In calculating just compensation, no account should be taken of special uses available only to the government or its successors or of the value of the property *after* the taking. See *United States* v. *Miller*, 317 U.S. 369; *United States* v. *Cors*, 337 U.S. 325. Thus, in the *Twin City* situation, the fact that, after the taking, the government might have been able to obtain power-site value for the land taken did not justify awarding that value to the landowner prior to the project. The same is true here.

Similarly misplaced is the court of appeals' reliance on the rule (*United States* v. *River Rouge Co.*, 269 U.S. 411; Rivers and Harbors Appropriation Act of 1918, Section 6, 40 Stat. 911, 33 U.S.C. 595) that, when only a portion of one's land is taken for river improvement, the compensation due the landowner is

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* The conveyance was made under the terms of the Act of July 14, 1960, Section 108, 74 Stat. 486, 33 U.S.C. 578.

reduced by the amount the remaining land is enhanced in value as a result of the project. This rule is merely the corollary of the principle that the condemnee is not entitled to any value resulting from the expropriation itself. See *United States* v. *Miller*, *supra*. It surely does not follow, as the court below believed (App. A, *infra*, pp. 12a-13a), that the exclusion from compensation of "any special and direct benefits to the remainder *arising from the improvement*" (*ibid.*, emphasis supplied) requires payment, in the first instance, for value attributable to riparian location.[7]

3. The decision below gives too narrow a scope to the government's navigational servitude and accords this Court's recent decisions an unduly restrictive reading. If allowed to stand, it will assuredly foster uncertainty in an important area of federal law; it is likely to result in windfalls to riparian landowners from the public Treasury and might encourage speculation in riparian properties. Within the Ninth Circuit, the decision will directly affect the result in a number of pending cases[8] and may also bear on the

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[7] The court below also relied on Sections 2(e) and 6 of the Submerged Lands Act, 67 Stat. 29, 30, 32, 43 U.S.C. 1301(e), 1314. It is manifestly apparent, however, that Congress intended no dilution of the government's navigational servitude in that Act. Furthermore, the Act concerned only submerged lands within the marginal sea. See *United States* v. *Louisiana*, 363 U.S. 1, 16-20; *United States* v. *California*, 381 U.S. 139, 150-160. The project involved here is 217 miles above the mouth of the Columbia River. H. Doc. No. 531, 81st Cong., 2d Sess., p. 282.

[8] *Robert C. Smith, et ux.* v. *United States*, No. 20787 (C.A. 9); *Mid-Columbia Storage & Terminal Co.* v. *United States*,

disposition of some $10,000,000 of pending claims[9] which, although arising in a distinguishable context, depend upon a conclusion as to the nature of the navigational servitude. And, since federal projects in aid of navigation reach into every region of the country, the ramifications of the decision below will undoubtedly not be confined to the Ninth Circuit.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1967.

No. 20536 (C.A. 9); *United States* v. *Pendleton Grain Growers, Inc.*, No. 65-303 (D. Ore.).

[9] *United States* v. *9,103.87 Acres in Clearwater County, Idaho (Potlatch Forests, Inc.)*, Civ. 3-66-11 (D. Idaho).

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,280

R. B. RANDS, ET UX., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

[October 7, 1966]

Appeal from the United States District Court for the District of Oregon.

Before: BARNES, KOELSCH and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

Appellants owned two tracts of land along the Columbia River, about six miles upstream from the present John Day Dam. On November 1, 1962, they leased this and other property to the state of Oregon, which wanted it for an industrial park. That industrial development, for maximum utility, required access to the Columbia River; because two railroads

and the United States owned most of the land along the river, appellants' property was especially valuable as a port site. The lease agreement gave Oregon an option to purchase the land. Most of the land was priced, under the option, at $150 per acre; the balance, denominated "port site property" in the agreement, was priced at $400 per acre.

The option was never exercised. On August 13, 1963, the United States filed a Declaration of Taking in the United States District Court, condemning this and other property in connection with the river development project of which the John Day Dam is a part. On September 25, 1963, the Secretary of the Army granted this and other land to the state of Oregon by a federal deed. Its use passed to a private corporation under a lease from the state of Oregon dated July 2, 1963. The record does not show and we are not told how much of the sale price or rents paid for the whole block of land involved are attributable to the two tracts in suit.

In response to the notice of taking, appellants filed a notice of appearance on September 3, 1963, contesting the amount of proposed compensation and requesting partial distribution of funds. On September 27 they filed a motion requesting permission to call their earlier appearance an answer and to amend it to raise defenses to the taking of their property. They assign as error the district court's refusal, under Rule 71A, F. R. Civ. P., to permit variance, under the excusable neglect provisions of Rules 6(b) and 60(b), from the requirement of Rule 71A that objections to the taking itself be filed within 20 days

from service of the notice of taking. Upon trial of the compensation issue, the district court held, relying on *United States* v. *Twin City Power Co.*, 1956, 350 U.S. 222, and *United States* v. *Virginia Elec. & Power Co.*, 1961, 365 U.S. 624, that that element of value of the land arising from its utility as a port site is non-compensable under the Fifth Amendment. Appellants say that that holding too is erroneous.

I. *Late Amendment under Rule 71A, F.R.Civ.P.*

Rule 71A(e) provides that "If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him." Part (a) of the same Rule makes the other rules of civil procedure applicable to condemnation actions "except as otherwise provided in this rule." The question, therefore, is whether the 20-day period is absolute, giving the district court no authority to extend it in cases of excusable neglect, or whether the excusable neglect provisions of Rules 6(b)(2) and 60(b)(1) confer such discretion.

District Courts have held that Rule 6(b) is not applicable to mitigate the time bar of Rule 71A(e), *United States* v. *7.724 Acres of Land*, E.D. La., 1962, 31 F.R.D. 290, but that Rule 60(b) is so applicable, *United States* v. *140.80 Acres of Land*, E.D. La., 1963, 32 F.R.D. 11, 14, *United States* v. *1.108 Acres of Land*, E.D. N.Y., 1960, 25 F.R.D. 205, see also *City of Davenport* v. *Three-Fifths of an Acre of Land*, S.D. Ill., 1957, 157 F. Supp. 794. The language of the rules themselves offers little guidance. The court be-

low, in concluding that the word "shall" in 71A(e) should be construed to be mandatory, found guidance in the fact that subsection (c)(2) of the rule provides that a defendant "*may* answer as provided in subdivision (e) of this rule," and thought it persuasive that the word "shall" as used in Rule 59(b) has been construed as mandatory. But the inference drawn from use of both "may" and "shall" is unwarranted; if "shall" had been used in subdivision (c)(2), a defendant would be required to file an answer, while if "may" had been used in subdivision (e), in practical terms no due date would apply to the answer other than those provided by other rules. Nor is the fact that the "shall" in Rule 59(b) has been said to be mandatory, see *Hulson* v. *Atchison T. & S.F. Ry.*, 7 Cir., 1961, 289 F.2d 726, conclusive. Rule 6(b) is by its own terms inapplicable to Rule 59(b), while *Hulson* held Rule 60(b) to be applicable to Rule 59(b) upon a showing of "extraordinary circumstances".

A strong case can be made for the proposition that "shall", as used in 71A(e), is permissive. The rule itself contains no language requiring a different conclusion. The Advisory Committee's note to subdivision (e) manifests no intent that the twenty-day limit be absolute—on the contrary, it seems to reflect an intent to cut off pleadings preliminary to the answer, not subsequent to it, and states that "the general standard of pleading is governed by other rules . . . and this subdivision (e) merely prescribes what matters the answer should set forth." Rule 6(b) lists the other rules to which it is inapplicable, without includ-

ing Rule 71A in that list. And the rules are to be construed in a liberal manner which effectuates their purpose "to secure the just, speedy, and inexpensive determination of every action" (Rule 1); here the Government itself conceded that appellants should be permitted to file a late answer.[1]

But we need not finally decide here whether the rule is mandatory or permissive, for in either case we think the result below was correct. The trial judge held alternatively that, assuming that he had discretion in the matter, he would deny the motion because "the defendants made no attempt to raise the question until after a substantial portion of the property had been transferred to the State of Oregon." Where, as here, the only "excusable neglect (Rule 6(b)) or "mistake, inadvertence, surprise, or excusable neglect" (Rule 60(b)) alleged is the defendant's original attorney's lack of knowledge of possible defenses to the taking, a substantial quantity of the land taken has been reconveyed after the 20-day period has elapsed and before a late answer is attempted to be filed, and the prima facie right to take is as clear as it is here,[2]

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[1] The Government's Memorandum in Opposition to Motion to Amend, while contending that Rule 71A alone was applicable to these proceedings, concluded with:

> "It is the government's view that the affidavit on file in support of the motion does show circumstances which in justice to the defendants should allow them to now file an answer after the twenty days from the service have elapsed."

[2] Here almost all of the two tracts involved were actually inundated by the waters of the reservoir created by the John Day Dam.

we think that denial of the motion was within the scope of the district judge's discretion.

II. *Port Site Value.*

In support of its proposition that the port site value of land riparian to navigable water is not required to be paid upon condemnation, the Government relies principally upon *United States* v. *Commodore Park, Inc.*, 1945, 324 U.S. 386; *United States* v. *Twin City Power Co.*, 1956, 350 U.S. 222; and *United States* v. *Virginia Elec. & Power Co.*, 1961, 365 U.S. 624 ("VEPCO"). In *Commodore Park*, land situated on a navigable inlet whose water was kept fresh by tidal flows was rendered less valuable when the government turned the inlet into a "stagnant pool" by dumping dredged material, accumulated in the course of rendering the connecting navigable bay more suitable for military vessels, across the mouth of the inlet. It was held that the resulting loss was noncompensable because "a riparian owner [does not] acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that privilege by an authorized governmental change in a stream . . . . Whatever market value of riparian lands may be attributable to their closeness to navigable waters does not detract from the government's 'absolute' power, in the interests of commerce, to make necessary changes in a stream. In short, as against the demands of commerce, an owner of land adjacent to navigable

waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as 'fishing and boating and the like', for which rights the government must pay. Riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold." 324 U.S. at 390-91.

In *Twin City*, the defendant power company owned land on the banks of a navigable river and on which it intended to build a private power facility, which the government took for the same use. In response to the power company's claim that the power plant site element of value of the land was compensable, it was held that "the flaw . . . is that the landowner here seeks a value *in the flow of the stream*, a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses . . . . That special location value is due to the flow of the stream . . . and in this case it is the water power that creates the special value, whether the lands are above or below ordinary high water. It is no answer to say that these private owners had interests in the water that were recognized by state law. We deal here with the federal domain, an area which Congress can completely pre-empt, leaving no vested private claims that constitute 'private property' within the meaning of the Fifth Amendment. Location of the lands might under some circumstances give them special value, as our cases have illustrated. But to attach a value of water power to the Savannah River due to location and to enforce

that value against the United States would go *contra* to the teaching of [*United States* v. *Chandler-Dunbar Water Power Co.*, 1913, 229 U.S. 58, 69]—'that the running water in a great navigable stream is capable of private ownership is inconceivable.' To require the United States to pay for this water-power value would be to create private claims in the public domain." 350 U.S. at 226-28. (Emphasis in original.)

Vepco was similar, except that there the government took the power company's easement of flow. It was held that no power site element of value could be awarded. The government here particularly relies on the Court's statement that "Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss . . . [citations omitted], it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated." 365 U.S. at 629.

We do not find those cases as persuasive as does the Government. *Commodore Park* dealt only with foreclosure of a privilege of access to navigable waters, not with the taking or invasion of all or any part of the defendant's tangible realty. More importantly, that case holds only that the Government may, in the exercise of its power to promote navigation, deny access to navigable waters, not that that access must not be considered when in the course of a condemnation

action it is shown to represent a part of the value of the land actually taken or invaded.[3]

The result in *Twin City* proceeded logically from an almost indistinguishable holding in *Chandler-Dunbar*, and absent language to the contrary cannot be said to have departed from the settled principles which are discussed below. Indeed, it expressly acknowledged that location value is compensable in some circumstances, and refrained from disapproval of *Chandler-Dunbar's* award of compensation for a private lock and canal, a use far more closely connected with "navigation" than its use as a port site. *Vepco*, read against its facts, goes no further than *Twin City*.

The Government claims, however, that power site value and port site value are logically indistinguishable because both depend upon proximity of the property involved to navigable water, and that the reference in the cases to the "flow of the stream" does not limit those holdings to flowing streams but rather is merely the result of the fact that those cases were concerned with flowing navigable waters. However persuasive this may be as a matter of logic, other considerations are weightier and are to the contrary. The historical treatment of analogous riparian location values and the statutory framework within which

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[3] Such a holding would necessarily have overruled *United States* v. *Chandler-Dunbar Water Power Co., supra*, in part, as well as *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 (which cases are discussed below). We find no evidence in any of the three cases discussed above of any such overruling intent, and cannot take upon ourselves what the Supreme Court has refrained from doing.

condemnation and reconveyance occur combine to convince us that port site value should be compensable under the Fifth Amendment.

The foundation of the cases upon which the Government relies is *United States* v. *Chandler-Dunbar Water Power Co.*, 1913, 229 U.S. 53. There the defendant power company owned land upon the bank of St. Mary's River and subsurface land to the middle of the stream on which it had constructed, respectively, a by-pass lock and canal system and a dam for power generation. The United States, in furtherance of its purpose to improve the navigability of the stream, took all of this property. Compensation was denied for the power site value of the land, but granted as to other elements. According to the Court, "riparian owners upon public navigable waters have in addition to the rights common to the public certain rights to the use and enjoyment of the stream which are incident to such ownership of the bank . . . . These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. . . . They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore." Id. at 70. Consequently compensation was allowed for the special value of the lock and canal and the land upon which it was situated for such purposes.[4] And as has been noted above, the Court in

[4] The government apparently did not object to a particular valuation of another parcel based upon its value "for general

Twin City did not disapprove, much less overrule, this holding. That the principle is of some antiquity is illustrated by *Boom Co.* v. *Patterson*, 1878, 98 U.S. (8 Otto) 403, 408, which held that the location of certain islands in a navigable portion of the Mississippi River, which location gave them a peculiar value for purposes of constructing a log-retaining "boom", was properly an element for consideration in fixing the amount of compensation due the owner upon a taking by a state agency.

United States v. *River Rouge Improvement Co.*, 1926, 269 U.S. 411 (construing 40 Stat. 901, 911, c. 155, § 6, now 33 U.S.C. § 595), establishes another part of this pattern. There a statute provided that where only a part of a parcel of land was taken for a river improvement project, the resulting award should be reduced by the amount of any direct benefit conferred upon the remaining land by the project. The trial court's overemphasis upon the government's continuing right to cut off the privilege of access to navigable water in the exercise of its overriding navigation servitude—which resulted in unduly reducing the "direct benefit" offset to the compensation award—was held error. "[A]n increase in the value of the remaining portion of any parcel of land caused by its frontage on the widened river, carrying a right of immediate access to and use of the improved stream, would constitute a special and direct benefit within the meaning of the statute. . . ." Moreover, "it is well

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wharfage, dock and warehouse purposes, disconnected with development of power in the rapids." *Id.* at 75.

settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, ... [citation omitted] he has, in addition to the rights common to the public, a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose . . . . [Citations omitted.]" Id. at 415, 417-18. The Court went on to note that these riparian rights are subject to the government's navigation servitude, but concluded that the mere existence of the government's power to reduce the value of riparian rights could not justify present valuation of them at a nominal amount; rather, they are to be valued in the light of a realistic estimate of the chance that the government will in fact exercise its servitude. This is directly contrary to the position which the Government takes in the case before us, but we think that the principles announced in this and other cases discussed above are still good law and find no intimation otherwise in the more recent pronouncements of the Supreme Court.

We also find support for this conclusion in the approach which Congress has taken to the problems inherent in condemnation for river development purposes. 33 U.S.C. § 595, whose predecessor was construed in *River Rouge, supra,* still provides that where only a part of a parcel of land is taken for a river development project, "the jury or other tribunal awarding the just compensation . . . shall take into

consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement . . . ." Now the government argues that where all of the land is taken, that element of its value attributable to its riparian location cannot be taken into account in computing its value. This is a fundamental and inequitable inconsistency, designed to give the government the best of both worlds. But if it is fair to allow compensation to be reduced by resulting benefit to retained property, then fairness dictates that the additional value of property taken, attributable to the same source (here, riparian location), should be paid for.

The inconsistency and the unfairness of the government's position are cast into sharper relief by 33 U.S.C. § 578. That section allows the Secretary of the Army to sell excess land for port and industrial purposes to the states or state-created agencies upon his determination that such development "on land which is part of a water resource development project under his jurisdiction will be in the public interest; (2) that such development will not interfere with the operation and maintenance of the project; and (3) that disposition of the property for these purposes under this section will serve the objectives of the project within which the land is located . . . ." It requires that any such sale be at "the fair market value of the land." Here just such a sale was made by the United States to the State of Oregon. Assuming that port site value is an element of fair market value

as that phrase is used in this statute—and we think that, absent any contrary indication in the statute, it must be so understood—then the principles of *Monongahela Nav. Co.* v. *United States*, 1893, 148 U.S. 312, 337-38, are applicable. There the government took a dam and associated lock and canal, passage through which was subject, under a franchise, to payment of a toll to the owner of the project. "After taking this property, the Government will have the right to exact the same toll the Navigation Company has been receiving. It would seem strange that, if by asserting its right to take the property, the Government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice."

Further support exists in the Submerged Lands Act, 43 U.S.C. §§ 1301-1343. That act, throughout its text and legislative history, see 1953 U.S. Code Cong. & Ad. News, 1385-1640, reflects the concern of Congress that any ownership it might assert over lands beneath navigable waters not impede economic development in the States. See *e.g.*, 15 U.S. Code Cong. & Ad. News, 1479-81, 1525. Where Congress sought to confirm ownership of natural resources in

the states, and through them, private persons, yet reserve certain rights to itself, it reserved only those rights which *Chandler-Dunbar* held were vested in the national government in the form of an overriding navigational servitude; 43 U.S.C. § 1301(e) defines the term "natural resources", "without limiting the generality thereof," by listing certain of such resources, then concludes with a statement that the term "does not include water power, or the use of water for the production of power," which is the resource reserved to the United States. Section 1314(a) explicitly reserves to the United States "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, *all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of* management, administration, leasing, *use, and development of the lands* and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others . . . ." (Emphasis added.)

To uphold the stand taken by the Government here would, we think, subvert this policy by inhibiting development of riparian property where the riparian nature of that property contributes significantly to its value and there is a reasonable possibility that it may at some time be taken by the Government for its own use in some navigation-connected project. And this, under our reading of the existing law and

in the face of a statutory scheme which should be read to provide fair treatment, we cannot do.[5]

Here the land obviously had value as a port site. It had historically been so used, and appellants had granted the state of Oregon an option to purchase it for almost three times the apparent market price of contiguous, non-port site property. At trial, appellants made an offer of proof that the land was worth at least $50,000. They should be given a chance to prove their claims.

Reversed and remanded for a new trial on the issue of just compensation.

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[5] The courts of New York have reached the same result in *Andrews* v. *State*, Ct. Cl., 1959, 19 Misc. 217, 188 N.Y.S.2d 854, aff'd, 1960, 11 App.Div.2d 599, 200 N.Y.S.2d 451, aff'd, 1961, 9 N.Y.2d 606, 176 N.E.2d 42, *cert. denied*, 1961, 368 U.S. 929.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,280

R. B. RANDS, et ux., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court for a new trial on the issue of just compensation.

Filed and entered October 7, 1966

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